**State of Michigan**
**In the Supreme Court**

Appeal from the Michigan Court of Appeals
Hoekstra, P.J., and Wilder and Zahra, JJ.

---

**People of the State of Michigan,**
Plaintiff-Appellee,

vs

**Duane Joshua Houston,**
Defendant-Appellant.

Supreme Court No. 126025

Court of Appeals No. 245889

Circuit Court No. 02-009348-FC

---

# Appellee's Brief on Appeal

---

**David S. Leyton** P35086
Genesee County Prosecutor
Attorney for Plaintiff-Appellee

Submitted by:

Donald A. Kuebler P16282
Chief, Research, Training & Appeals
100 Court House
Flint, MI 48502
(810) 257-3854

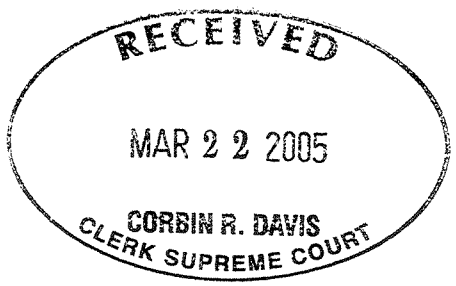

Table of contents

Index of authorities

other authorities

## Statement of jurisdiction

The Court of Appeals affirmed defendant Houston's convictions and sentences for second degree murder and felony firearm in *People v Houston*, 261 Mich App 463 (2004). Jurisdiction is in the Michigan Supreme Court per this Court's order of November 4, 2004 granting defendant's application for leave to appeal in *People v Houston*, SC 126025. The leave grant limits the appeal to the following issues: (1) whether Offense Variable 3, MCL 777.33, was properly scored; and (2) whether a sentence of life falls within the statutory sentencing guidelines for second-degree murder for a defendant who is an habitual offender. [Appendix 19a]

## Standards of Review

The standards of review will be set forth in the argument portion of this brief, *infra*.

## Statement of questions presented

### Issue I

Whether Offense Variable 3, MCL 777.33, was properly scored.

Defendant-Appellant says: No

Plaintiff-Appellee says: Yes

### Issue II

Whether a sentence of life falls within the statutory sentencing guidelines for second-degree murder for a defendant who is an habitual offender.

Defendant-Appellant says: No

Plaintiff-Appellee says: Yes

## Counter-Statement of facts

Defendant Houston appealed by right his jury-based convictions for second degree murder, MCL 750.317, and felony firearm, MCL 750.227b and sentence for habitual offender, second offense. The Court of Appeals rejected defendant's argument that the trial court abused its discretion in admitting evidence that three days before the murder he possessed a weapon similar to the one used in the murder. Defendant also maintained that imposition of a life sentence for second-degree murder was improper because Judge Ransom relied on inaccurately scored sentencing guidelines. The Court of Appeals held that the trial court did not abuse its discretion in admitting the evidence in question. Although defendant's arguments regarding the scoring offense variables OV 3 and OV 14 were found to be meritorious, the Court of Appeals **assumed** that OV 3 was improperly scored, but held as matter of first impression, a life sentence for second degree murder was proper even under defendant's version of the correct scoring since defendant was an habitual offender. [Appendix 15a-18a]

The case is before this Court on leave to appeal granted to defendant. The Court limited review to the following issues: (1) whether Offense Variable 3, MCL 777.33 was properly scored; and (2) whether a sentence of life falls within the statutory sentencing guidelines for second degree murder for a defendant who is an habitual offender. *People v Houston*, SC 126025 (2004). [Appendix 19a]

## Issue I

**Whether Offense Variable 3, MCL 777.33, was properly scored.**

### Standards of review

As a general rule interpretation and application of the Michigan statutory sentencing guidelines, MCL 771.11 *et seq.*, involves questions of law which are reviewed *de novo*. *People v Perkins*, 468 Mich 448, 452 (2003); *People v Morson*, 471 Mich 246 (2004).

### Argument

The question of proper scoring of OV 3, around which so much controversy here swirls, requires that this Court give the bench and bar a definitive answer on whether the trial court has jurisdiction to assess 25 points where a victim suffers life threatening or permanent injury even where the victim dies.

The general principle underlying the imposition of a sentence calls for the balancing of the public protection, the gravity of the offense and, particularly, the rehabilitative needs of the defendant. See e.g., *Com v Ennis*, 574 A2d 1116 (1990). On the other hand the people should not be deprived of their right to exact a sufficient penalty for the defendant's criminal conduct. See e.g., *People v Collins*, 380 Mich 131 (1968).

The Michigan legislative sentencing guidelines control this case since defendant's jury-based convictions for second-degree murder and felony firearm occurred after January 1, 1999. See MCL 777.1 et seq., *People v Reynolds*, 240 Mich App 250, 254 (2000); *People v Abramski*, 257 Mich App 71, 74 (2003).

Robert M. Ransom, J., sentenced defendant Houston to life imprisonment for second-degree murder based on the guidelines score of 5 prior record variables (PRV) points and 115 offense variable (OV) points.[1] Since defendant was also sentenced as a second offender defendant's score resulted in a recommended range of 180 to 325 months, or life derived from box III-B in the "M2" grid of the sentence guidelines. In the Court of Appeals defendant argued that Judge Ransom erroneously scored OV 3 at 25 points rather than 0 points because the sentencing offense was a homicide, not the result of the operation of a vehicle under the influence or while impaired pursuant to *People Hauser*, CA 239699 (Oct 29, 2003). Defendant also challenged the scoring of OV 14 at 10 points for being a leader in a multiple offender situation where the prosecutor conceded that the other person involved was an unwilling participant who had no criminal liability. [Appendix 15a]

The Court of Appeals **assumed** that Judge Ransom erred in scoring OV 3, but concluded resentencing was not warranted since imposition of a life sentence for second-degree murder was still within the appropriate guidelines range. Defendant agreed that error in scoring OV 14 would not affect the guidelines recommended sentence, but contended that changing both OV 14 and OV 3, or just OV 3 alone, would lower the recommended minimum sentence from 180 to 375 months or life (III-B) to 162 to 337 months (II-B). Defendant argued that because a life sentence is not listed as an alternative sentence in box II-B of the "M-2" grid, the life sentence imposed by Judge

[1] Defendant submitted a copy of the SIR which reflects that Judge Ransom improperly calculated the total score for the offense variables at 105 points. However, when correctly tallied, offense variables add up to 115 points.

Ransom exceeded the appropriate guidelines range. Defendant thus maintained resentencing was required.

In response to the issue framed by this Court's grant order, *supra*, the people maintain that Judge Ransom properly scored OV 3 at 25 points.

Prior to enactment of the statutory guidelines, a sentencing court had broad scoring discretion under the Supreme Court's judicial sentencing guidelines. Admin Order 1988-4. The decisions construing the judicial guidelines consistently held that the scoring must be affirmed when there is some evidence to support it. See e.g., *People v Garner*, 215 Mich App 218, 219 (1996); *People v Ayers*, 213 Mich App 708 (1995).

Although the decisions in *Garner* and *Ayer* were entered prior to enactment of the new statutory guidelines, the legal principles cited therein have been held to apply to offenses occurring after January 1, 1999. In *People v Higueara*, 244 Mich App 429, 426 (2001) the Court said: the "Legislature is presumed to act with knowledge of appellate court statutory interpretations ... and ... silence by the Legislature for many years following judicial construction of a statute suggests consent to that construction." Accordingly, a sentencing court must exercise its discretion and determine the appropriate points to be scored under the statutory guidelines. See e.g., *People v Taylor*, CA 223408 (April 2, 2002).

OV 3 assesses points for physical injury to a victim. MCL 777.33 provides in pertinent part:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply *by assigning the number of points attributable to the one that has the highest number of points*:
>
> (a) A victim was killed ... 100 points
> (b) A victim was killed ... 50 points

(c) **Life threatening or permanent incapacitating injury occurred to the victim** ... 25 points
(d) Bodily injury requiring medical treatment ... to the victim ... 10 points
(e) Bodily injury not requiring medical treatment ... to the victim ...5 points
(f) No physical injury occurred to a victim ... 5 points

Defendant argues 25 points may not be assessed under section (c) for a life threatening injury where the sentencing offense is a homicide. Defendant contends Judge Ransom improperly assessed him 25 points because victim John Strong was killed. [Def's brief p 6] Stated another way, section (c) only applies where the victim suffering life-threatening or permanent injury lives, thus the sentencing offense is not a homicide.

In further support of his position defendant has filed a supplemental argument citing the recent published opinion in the Genesee County case of *People v Brown*, 265 Mich App 60 (2005). (On remand from the Supreme Court—*People v Brown*, 469 Mich 860 (2003)).

In *Brown* the Court held that in cases where one hundred points cannot be assessed because the sentencing offense is a homicide as defined by the statute, the appropriate score for OV 3 is zero points. The Court concluded that where the victim does not survive the offense with serious injuries and dies, a trial court errs in scoring OV 3 at twenty-five points. *Brown, supra* at 66.

At page IX of the 2003 Edition of the Michigan Sentencing Guidelines Manual it is stated, "in the event the manual fails to comport exactly with the law, remember that the statute is the controlling authority."

Statutory construction jurisprudence generally states that it is the primary duty of a reviewing court to give effect to the legislative intent; and if a literal interpretation leads to an unreasonable result, plainly at variance with the purpose of the legislation as a

whole, the court must examine the matter further. Statutes, as a rule, will not be interpreted so as to yield an absurd result. **73 Am Jur 2d Statutes,** sec. 172 **Unreasonable or Absurd Results**. It has also been said that in cases involving questions of constitutional law and statutory interpretation reviewing courts resolve the same by applying their independent judgment. In this regard the Alaska Supreme Court has held that it is the court's duty to adopt the rule of law which is most persuasive in light of precedent, reason and policy. *Todd v State*, 917 P2d 674 (Alaska 1996).

The Constitution does not mandate adoption of any one penological theory; rather, sentence can have a variety of justifications, and selection of sentencing rationale is generally a policy choice made by state legislatures, not by the federal courts. *Ewing v California*, 155 L. Ed 2d. 108 (2003).

In *People v Brown*, *supra*, the Court observed that there is currently a split in the Court of Appeals as to the propriety of scoring OV 3 at 25 points. Fn 4 refers to the unpublished decisions in *People v Smith*, CA 234830 (Jan. 27, 2003) and *People v Williams*, CA 224727 (Aug. 11, 2002) upholding the scoring of OV 3 at 25 points as well as Justice Markman's dissent from the Supreme Court order denying leave to appeal in *People v Hauser*, 468 Mich 861 (2003). At fn 5 the Court refers to *People v Stanko*, CA 24287 (Jan. 27, 2004); *People v Edlen*, CA 242167 (Dec. 23, 2003); *People v Martin*, CA 231696 (Dec. 13, 2002) and *People v Hauser*, CA 239688 (Oct. 29, 2002) as authority for the proposition that the proper score for OV 3 is zero.

The people agree that MCL 777.33(2)(b) prohibits the assessing of 100 points where the sentencing offense is a homicide, but submit that this limitation applies only to

the scoring of 100 points. The people maintain plain reading of the statute shows that this limitation only applies to the scoring of 100 points:

> Sec. 33. (1) Offense variable 3 is physical injury to a victim. Score variable 3 by determining **which** of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

Under the facts of the case *sub judice,* out of choices (a) through (f), only section (c), **Life threatening injury**, has application to defendant Houston as properly determined by Judge Ransom.

In *People v Albers*, 258 Mich App 578 (2003) the defendant argued that the court improperly scored twenty five points for OV 3—life threatening injury to another victim at the Byers' home. The court disagreed. Defendant contended that use of the term victim in the singular in MCL 777.33 was an indication of legislative intent that OV 3 apply only to the victim of the charged offense. The court cites MCL 8.3b for the proposition that "[e]very word importing the singular number only may extend to an embrace the plural number, and every word importing the plural number may be applied and limited to the singular number." The court further said that if the Legislature had intended to limit the application of OV 3 to the victim of the charged offense, it could have expressly included such a provision in the statute. In the absence of authority to the contrary, the court concluded that, for purposes of OV 3, the term "victim" includes any person harmed by the criminal actions of the party charged.

The same is true as to the case at bar, that is, the Legislature easily could have, but chose not to limit assessing 25 points to non-homicide cases. This demonstrates a clear legislative intent that 25 points be assessed where the victim, as in the case *sub judice,* suffers a life threatening injury. [Defendant Houston shot the victim in the head

and he later died from that injury, PSR p2. See also testimony of Pathologist Terry Krznarich, Vol II, p, 188, cause of death gunshot wound to the head.]

Where the language of a statute is clear and unambiguous, the plain meaning of the statute reflects legislative intent and judicial construction is not warranted. *Tryc v Michigan Veteran's Facility*, 451 Mich 129, 135-136 (1996). Language in a statute is to be given its ordinary and accepted meaning, whereas if a statute defines a given term, that definition is controlling. *Tryc, supra.* The court must also "afford the statute an interpretation that achieves harmony between and among specific provisions to provide a reasonable meaning." *Messenger v Dep't of Consumer & Industry Services*, 238 Mich App 524, 533 (1999). Moreover, "... nothing will be read into a statute that is not within the manifest intent of the Legislature as gathered from the act it self."

Statutory construction is a legal determination reviewed by this Court under a *de novo* standard of review. *People v Perkins*, 468 Mich 448,452 (2003). When interpreting a statute, the court first looks to see whether the statute's language is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation. The object of all statutory interpretation is to ascertain and effectuate legislative intent. *State v Bluhm*, 663 NW2d 24 (2003).

Where an ambiguity exists in a statute, the appellate court seeks to effectuate the Legislature's intent by applying a reasonable construction based on the purpose of the statute and objective sought to be accomplished. The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. *People v McLaughlin*, 258 Mich App 635 (2003).

Defendant contends that the guidelines prohibit a sentencing judge from assessing 25 points under OV 3 where the victim sustained life-threatening injuries but later dies from them. The people disagree and submit that if the legislature had wished to restrict judicial discretion, it would have selected language that leaves no doubt. But it did not do so. *Bluhm, supra.*

Early guidelines reforms attempted to narrow the focus of sentencing to emphasize uniformity and "just desserts," and to promote a more rational sentencing policy. "The broader range of contemporary sentencing goals demonstrates an important underlying truth, which early guidelines reforms (and some recent proposals) seem to have overlooked: sentencing policy is very complex, requiring compromise and careful balancing of numerous, often-competing goals. Yet basic concepts and rules must remain fairly easy for the public and system actors to understand and apply. Designing a workable system to achieve all of these goals and values is NOT an easy task." See 44 STLULJ 425: **Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines**, Richard S. Frase.

The Michigan Penal Code, MCL 750.2 has its own rule of statutory construction.

> The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the object of the law.

If a statute provides its own glossary, then terms must be applied as expressly defined; however, where the statute does not define a term, resort to a dictionary for definition is appropriate. *Sanchez v Eagle Alloy, Inc.* 254 Mich App 651 (2003), *lv* granted, 671 NW2d 874; *Pobursky v Gee*, 249 Mich App 44 (2001); *People v Armstrong*, 212 Mich App 121 (1995).

When the legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional. *Carson City Hosp. V Department of Community Health,* 253 Mich App 444 (2002); *People v Jones*, 190 Mich App 509 (1991).

To constitute a crime, the act in question must ordinarily be one to which is annexed, upon conviction, a specified punishment. **21 Am Jur 2d Criminal Law, sec. 5, Imposition of penalty or punishment**.

Penal statutes are within the operation of the general rule that statutes in *pari materia* should be construed together. Under this rule, statutes in relation to the same offense must be taken together and construed as if the matters to which they relate were embraced in a single statute. Similarly, where several legislative acts are part of the same system of laws providing for prosecution of crimes, misdemeanors, and offenses, naming the parties who will prosecute and prescribing the means and methods to be pursued therein, they must be construed in *pari materia*. **73 Am Jur 2d sec. 205 Provisions in pari materia.** In *Jenkins v Pagel*, 256 Mich App 112 (2003) the court said that where two statutes that relate to the same subject or share a common purpose in *pari materia* they should be read together as one law, even if they contain no reference to one another and were enacted at different dates. In *People v Libbett*, 251 Mich App 353 (2002) the court reminds us that the court on appeal is required to construe a statute in light of other statutory provisions in order to carry out the intent of the legislature.

The people maintain that if the purpose of the Michigan criminal statutes prohibiting dangerous assaultive crimes, e.g., felonious assault [MCL 750.82]; assault with intent to murder [MCL 750.83], is to discourage **life threatening injuries**, then

defendants such as appellant Houston, can be properly assessed 25 points under OV 3, even where the victim assaulted subsequently dies.

It is a cardinal principle of statutory construction that "absurd consequences" are to be avoided if a "logical alternative" is available. *People v Pruitt*, 23 Mich App 510 (1970) citing *In re Wright*, 360 Mich 455, 459 (1960).

The people submit that the Court of Appeals' interpretation in the case *sub judice* and in *People v Brown*, *supra*, if affirmed obviously will lead to an unreasonable result, which is at variance with the purpose of the sentencing guidelines legislation as a whole. If the purpose of the Michigan Penal Code is to discourage dangerous assaults and life threatening injuries, and the sentencing guidelines exist to aid the court in assessing punishment, construing these statutes in *pari materia,* would thus permit Judge Ransom to assess defendant 25 points for OV3. Sentencing statutes [guidelines] should be interpreted so as to not reach an absurd result. Otherwise, a criminal such as defendant Houston would be encouraged to kill his victim so as to avoid exposure to a harsher punishment. cf., *Dillard v State.*, 820 So2d 994 (Fla 4th DCA App 2002).

The Court in *Brown* contends MCL 777.33 is ambiguous since various panels of the Court of Appeals have split on the question of whether to score or not score OV 3 at 25 points where the victim dies. Slip op. at p 3 and see again fn 4 and the referenced unpublished opinions.

The people maintain that the Court of Appeals reliance on *People v Hauser*, CA 239688 (Oct. 29, 2000) in the case *sub judice* and in *People v Brown* is misplaced. The people thus submit that the Court's "plain and most reasonable analysis" and its

conclusion that the intervening sections are meant to apply to some harm short of death is inconsistent with the intent of the legislature and the jurisprudence.

The rule of statutory interpretation that ambiguous penal statutes are construed in favor of the defendant is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable. See e.g., *People v Anderson*, 43 Cal 3d 1104, 1145-1146 (1987) The decisions further state that "[A] rule of construction ... is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. " *In re Estrada*, 63 Cal 2d 740, 746 (1965).

The people submit that one of the shortcomings of the Court of Appeals opinion in *Brown* is the Court's reliance on one rule of statutory construction. That is, interpretation of the statute on grounds that it is ambiguous, but where no ambiguity exists. The shortcoming in this case of *Houston*, is the Court's failure to construe the statute at all and its **assuming** that Judge Ransom erred in scoring OV 3.

The Court in *Brown* and in *Hauser* hold that OV 3 may not be scored because MCL 777.33 reflects a graduated scale for assessing harm to the victim. The Court explains:

> ... Given that death is assessed the highest number of points and no injury at all is assessed at no points, the plain and most reasonable meaning of the intervening sections is that they are meant to apply were there is some harm short of death. Otherwise, a death for which points cannot be assessed under subsection 33(2) could be assessed under subsections 33(1)(b),(c) or (d) if the victims dies after sustaining some injury. If that were the intent of the Legislature, it would not have limited the assessment of points for a victim's death to those crimes in which death of a person is not an element, but would have eliminated subsection 33(2)(b) altogether.

The people submit that the Court 's conclusion that the intervening sections are meant to permit scoring only for injuries "short of death" violates the rule of construction prohibiting the reviewing court from adding words to the statute. *In re Wayne County Prosecutor*, 232 Mich App 482, 486 (1998).

To conclude that the Legislature in approving the guidelines intended to erase distinctions among offenders based on the circumstances of the offense, distinctions carefully set forth in forth in MCL 777.33, would be senseless. There is no indication in the statute that a defendant should not be assessed 25 points under OV 3 for the infliction of a life threatening injury that precedes death. The people respectfully submit the Court of Appeals' refusal in the instant case to uphold the Judge Ransom's scoring of OV 3 at twenty-five points is contrary to the intent of the Legislature.

The people maintain the error in the construction of MCL 777.33 in this case of *Houston* and in *Brown* is the Court's failure to consider the significance of the term "**life threatening injury**." The failure to do so has caused the respective panels in *Hauser*, *Houston*, *Brown*, and *Stanko* to reach the wrong result in holding that OV 3 can only be assessed in those instances where there is injury or some harm short of death and not to those cases where there is some survival prior to death.

The people find support for their position in the Court of Appeals unpublished decisions in *People v Smith*, CA 234830 (May 20, 2003), *lv den* 469 Mich 978 (2002) and *People v Williams*, CA 224727 (Oct. 11, 2002), as well as from a review of the jurisprudence of other jurisdictions. For example, in *United States v Billingsley*, 978 F2d 861 (1992), *cert den* 123 L Ed 2d 280 (1992) it was held that the district court properly adjusted the serious bodily injury offense level under the guidelines upward for the death

of victim regardless of the fact that pursuant to sentencing guideline sec. 2F1.1(b)(4), the definition makes no mention of death being included. The defendant murdered, stole and cashed U.S. Treasury checks of the victim. The defendant argued the court should not have taken death into consideration when providing for an adjustment for the conscious reckless risk of serious bodily injury since there was insufficient evidence for the departure and the departure for death was unreasonable. Pursuant to 18 USCA sec. 3553(b), a District Court may depart upward from the range provided in the guidelines if the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission. Further pursuant to the guidelines policy statement, U.S.S.G. sec. 5K2.1, the court may increase the sentence above the guideline range if death resulted; and a substantial increase may be appropriate if the death was intended or knowingly risked, or if the underlying offense was one for which base levels do not reflect an allowance for the risk of personal injury, such as fraud.

Where the statute is clear, as in the case *sub judice*, courts will not interpret away clear language in favor of an ambiguity that does not exist. *People v Coffee*, 151 Mich App 364 (1986). If however, the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and legislative history. The Court must select the construction that comports most closely with the view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. *People v Coronado*, 12 Cal 4$^{th}$ 145, 151 (1995); *People v Pruitt*, 23 Mich App 510 (1970). It is also said that the

rules of construction are subordinate to the primary rule that a statute must be interpreted consistent with legislative intent. *Estate of Banerjee*, 21 Cal 3d 527, 539 (1978).

The Michigan statutory sentencing guidelines [MCL 777.33] penalize the causation of life threatening injuries under OV 3. The term "**life threatening**" can be readily defined by dictionary reference. See 823 Concise Oxford English Dictionary (11th Ed 2004) (defining "life threatening" as "potentially fatal"); ENCARTA WORLD ENGLISH DICTIONARY (1999) (defining "life threatening" as "very dangerous or serious with the possibility of death as an outcome."); 1306 Webster's Third New International Dictionary (1981) (hereinafter "Webster's") defining "life" as "the earthly state of human existence"); 2302 Webster's (defining "threatening" as "indicat[ing] as impending"); and 1164 Webster's (defining "injury" as "hurt" damage, of loss sustained." )

Consequently, it was not necessary for the legislature to define the term "**life threatening**" in order to permit the sentencing judge to assess 25 points for OV 3. By common parlance a **life threatening injury** is one that is potentially fatal. 823 **Concise Oxford English Dictionary,** *supra*, in that it is "very dangerous or serious with the possibility of death as an outcome." 1402 ENCARTA World Dictionary, *supra*.

The people submit that it is obvious from Judge Ransom's scoring of OV3, that he viewed victim Strong's life threatening injury [a close range shot to his head by defendant as he sat as a front seat passenger in parked auto] as one in which the possibility of death was imminent or potentially fatal.

Decisions from other jurisdictions hold that the brandishing of a firearm, with or without pointing it at a victim, is an implicit threat that may warrant an aggravated

sentence. See e.g., *People v Zamarron*, 30 Cal App 4th 865, 872 (1994); *People v Simms*, 24 Cal App 4th 462, 469 fn 8 (1994) superceded by statute on other grounds as stated in *People v Jefflo*, 63 Cal App 4th 1314, 1316 (1998).

Defendant Houston's pointing a gun at the head victim Strong as he sat in a parked auto is a particularly dangerous and menacing use of a weapon as opposed to a purely spontaneous or accidental discharge of the gun. The people maintain that defendant's infliction of life threatening great bodily injury upon victim Strong warranted Judge Ransom's assessment of 25 points for OV 3. Moreover, the fact that the gunshot hit victim Strong in the head supports the conclusion that defendant intended to inflict a "life threatening injury." See *People v Vorsie*, 72 Cal App 4th 312, 318, 319 (1999). [method or manner of killing may show premeditation]. Shooting at close range into victim Strong's head, resulting in life threatening injury would support a jury finding of specific intent to kill. See *People v Chinchilla*, 52 Cal App 4th 683, 690 (1997).

The people respectfully submit that if the manifest purpose of the Michigan Penal Code is to prohibit assaults with dangerous weapons and the sentencing guidelines scoring subjects a convicted defendant to a more substantial punishment for inflicting a life threatening injury, it is difficult to imagine a more rational way of deterring defendants than to subject them to stiffer punishment.

In construing MCL 777.33 the Court's objective is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. See e.g., *People v Jenkins*, 893 P2d 122 (1995); *Zawacki v Detroit Harvester Co.*, 310 Mich 415 (1945). In approaching this task, the court must begin with the statutory language. *People v Vallodoli*, 918 P2d 999 (1996). If there is no ambiguity or uncertainty, the Legislature is presumed to have

meant what it said and there is no need to resort to extrinsic indicia of legislative intent, such as legislative history. *People v Coronado*, 906 P2d 1232 (1995); *People v Hendrix*, 941 P2d 64 (1997). On the other hand, "language that appears unambiguous on its face may be shown to have a latent ambiguity." *Quarterman v Kefauver*, 64 Cal Rptr 2d 741 (1997). In such a case, a court may turn to customary rules of statutory construction, the "'wider historical circumstances," or legislative history for guidance, keeping in mind the "consequences that will form from a particular interpretation.'" *People v Cruz*, 919 P2d 731 (1996). The decisions also indicate that it is always preferable to rely on the literal meaning of the words used. "'[I]t is a settled principle of statutory construction that language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the legislature did not intend." [citations] Thus, '[t]he intent prevails over the letter and the letter will, if possible be so read as to conform to the spirit of the act.'" *People v Pieters*, 802 P2d 242 (1991); *People v Ledesma*, 939 P2d 1310 (1997). A reviewing court will not favor a defendant's interpretation if it would lead to results "that are contrary to legislative intent or that fail to prevent the harm that is identified in the statute or that override common sense and ... palpable absurdities. *People v Davis*, 212 Cal Rptr 673 (1985); *People v Jiminez*, 15 Cal Rptr 268 (1992) [defendant's construction must be rejected if unreasonable, absurd or contrary to legislative intent.]

The people submit that MCL 777.33(1)(c) does not prohibit Judge Ransom from assessing defendant Houston 25 points. The role of the judiciary is not to rewrite legislation to satisfy the court's rather than the legislature's sense of balance and order..." *People Carter*, 67 Cal Rptr 2d 845 (1997).

The people maintain that defendant Houston's proposed interpretation of MCL 777.33 (1) (c) and the interpretation of the Court of Appeals in *Brown* is unreasonable.

On the other hand, the people submit the Court of Appeals decisions in *People v Smith* and *People v Williams*, *supra*, as well as Justice Markman's dissent from this Court's order denying leave to appeal in *People v Hauser*, 468 Mich 861(2003) constitute a reasonable interpretation of MCL 777.33.

In *People v Williams* defendant was jury-convicted of second-degree murder and felony firearm. He was sentenced as a second habitual offender, MCL 769.10, to thirty-nine to sixty years for the murder and two years consecutive for felony-firearm. The Court rejected defendant's challenges to the scoring of the new sentencing guidelines and the proportionality of his sentence. The Court held:

> ... The instructions to offense variable 3 state that the court should assign the highest number of points. Obviously, a death is a personal injury, but 100 points could not be assessed because of MCL 777.33(2)(b), which instructs that the court should not assess 100 points in homicide cases. As a result, the next highest level, 25 points, was the appropriate score for offense variable 3.

In *People Smith*, *supra*, the defendant was also jury-convicted of second-degree murder and felony firearm and carrying a concealed weapon. He was sentenced to life imprisonment for the murder and two years consecutive for felony firearm and five years for CCW. On appeal the prosecutor agreed that OV 3 was improperly scored at 100 points. Defendant argued that OV 3 should be assessed a zero and the prosecutor argued that it was to be assessed at 25 points. The Court held:

> ... OV 3 provides that zero points are to be assigned when "[n]o physical injury occurred to a victim" and twenty-five points are to be assigned when"[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c) and (f), MCL 777.33(2)(b) prohibits assigning points for a resulting death when "homicide is not the sentencing offense."

> In this case, the victim was killed after defendant placed the victim under life threatening circumstances. We conclude that the correct score for OV 3 is twenty-five points.

The people maintain that Justice Markman correctly wrote that OV 3 must be scored at 25 points where there is "physical injury ... to the victim." "Indeed, the victim was injured to the point of ***death." Under *People v Williams* and *People v Smith* and the rationale of Justice Markman in *Hauser,* this Court should be persuaded to deny defendant's request for resentencing.

In *People v Jones*, 46 Cal 3d 585 (1988) Justice Kaufman summed up the reviewing Court's duty in construing statutes in these terms:

> This court has the constitutional duty and function of ascertaining legislative intent and construing statutes in accordance therewith. By necessity, this function becomes significant only when a statute is unclear in some respect. It would be inappropriate to automatically conclude that, because a statute is ambiguous in some respect, we are not to attempt to construe its meaning and effect. Such overbroad construction would constitute an abdication of our responsibility as the final arbiter of the meaning of legislative enactments.

The people respectfully submit that under the facts of this case and the jurisprudence Judge Ransom properly assessed defendant *Houston* 25 points under OV 3. This Court should reach the same conclusion and thus deny defendant's request for resentencing.

## Issue II

**Whether a sentence of life falls within the statutory sentencing guidelines for second-degree murder for a defendant who is an habitual offender.**

### Standards of review

Questions of statutory construction are reviewed *de novo. People v Laws*, 218 Mich App 447, 451 (1996).

### Argument

Judge Ransom sentenced defendant Houston to life in prison for second-degree murder based on sentence guidelines scoring of 5 prior record variable (PRV) points and 115 offense variable (OV) points. [The correct OV score is 105 points but the math error does not affect defendant's claim of error—see fn 2 at Appellant's Appendix 15a]

Because defendant was also a second felony offender, the trial court guidelines score resulted in a recommended minimum sentence of 180 months to 375 months, or life in prison derived from box III-B in the "M2" sentence guidelines grid.

At page 3 of The Michigan Sentencing Guidelines Manual, 2003 Edition in "The General Information and Instructions for Use of the Sentencing Guidelines" it is provided:

> "If the sentencing judge decides to impose an enhanced sentence pursuant to the habitual offender statutes, the appropriate sentence range will be found in the habitual offender grids."

At page IX it is stated that "in the event the manual fails to comport exactly with the law, remember that the statute is the controlling authority."

In the Court of Appeals defendant argued Judge Ransom improperly scored OV3 at twenty-five points instead of zero since the conviction was for a homicide rather than a

death that was the result of the operation of a motor vehicle while under the influence or impaired pursuant to the unpublished opinion in *People v Hauser*, CA 2339688 (Oct. 29, 2003). See *People v Houston*, 261 Mich App 463, 470 (2004). [Appendix 15a-18a]

In the Court of Appeals defendant contended that while scoring OV 14 did not affect the guidelines recommendation, changing both OV 14 and OV 3, or just OV 3, lowered the recommended minimum sentence from of 180 to 375 months or life (III-B) to 162 to 337 months (II-B). Defendant argued that because a life sentence is not listed as a alternative sentence in the II- B box of the "M2" sentencing guidelines grid, the imposition of a life sentence exceeded the appropriate guidelines range, thus requiring an order for resentencing.

Defendant maintains the Court of Appeals erred when it ruled as a matter of first impression that the Legislature intended the possibility of a life sentence for every habitual offender where the top of the guidelines range is 300 months or longer. [Def's brief p 13] The people disagree.

Under the legislative guidelines, MCL 769.32(2), the trial court is required to impose a sentence within the guidelines range. *People v Hegwood*, 465 Mich 432, 438 (2001). For defendant's conviction for second-degree murder, under the Penal Code, MCL 750.317, the legislature has provided defendant shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same. The Court of Appeals in the instant case said that since the trial judge has alternative sentences that can be imposed, i.e., "life" or "any term of years", and those sentences are "'mutually exclusive ... a sentencing judge may (in the appropriate case)

opt for either but not both.'" See P*eople v Johnson*, 421 Mich 494, 497- 498 (1984) and *People v Carson*, 220 Mich App 662, 669 (1996).

Answering the question of whether a sentence of life falls within the sentencing guidelines for second degree murder for an habitual offender, the people submit that the answer is "Yes."

In *Gryger v Burke*, 334 US 728, 732 (1948) the court rejected an habitual offender's defendant's double jeopardy argument where it held: "The sentence as a ... habitual offender is not viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* at 732; see also *Oyler v Boles*, 368 US 448, 451 (1962) ("[T]he practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge....").

The Court in this case of *Houston* correctly states that the Legislature has not established separate grids where the habitual offender act applies. Instead, the Legislature has only directed that the upper level of the appropriate recommended minimum sentence range for an indeterminate sentence be increased in proportion to whether the prior convicted felon has one (25%), two (50%), or three (100%) prior felony or attempted felony convictions. See MCL 777.21 (3). [261 Mich App at p 474, Appendix 17a]

The people maintain that the Court of Appeals properly analyzed the issue presented. That is, the Court stated that the Legislature has provided clear guidance as to when a life sentence within the guidelines range is appropriate. In the absence of an adjustment under MCL 777.21(3), each of the possible sentence guidelines loci (twelve

of eighteen) where the upper range of the minimum sentence is three hundred months or more, permits a life sentence as an alternative. See MCL 771.61. The Court of Appeals held that whether a life sentence is within the guidelines is a function of the upper limit of recommended minimum sentence range for an indeterminate sentence. The Court of Appeals thus concluded "[W]here the upper range is three hundred months (twenty five years) or more, a life sentence is an appropriate alternative sentence within the guidelines recommendation." [261 Mich App at p 475, Appendix 17a]

The Court said that its conclusion was buttressed by the fact that only one of six loci in the M2 grid, III-A (162 to 270 months) recommends an alternative life sentence where the upper limit of the recommended minimum sentence range is less than three hundred months, citing MCL 777.61. Similarly, the guidelines grid for class "A" offenses has life as a recommended alternative sentence only where the upper limit of the recommended minimum sentence range is at least three hundred months. The Court summarized its decision as follows:

> In sum, we hold that a life sentence for second-degree murder is outside the guidelines where the appropriate guidelines locus is II-B, and MCL 777.21(3) does not apply. But, where MCL 777.21(3)(a) applies to increase the upper limit of locus II-B to 337 months, then a life sentence is within the appropriate guidelines range. Accordingly, in this case, even if OV 3 and OV 14 were wrongly scored, the life sentence the trial court imposed was within the guidelines recommended range. Accordingly, remand for resentencing is not required. (citations omitted.). [265 Mich App at p 475, Appendix 18a]

The people maintain that this Court should reject defendant's argument that Judge Ransom improperly sentenced him to life imprisonment as a habitual offender.

**Relief**

Wherefore, the people pray that this Honorable Court will deny defendant's request for resentencing.

Date: March 21, 2005

Submitted by

David S. Leyton P 35086
Prosecuting Attorney
Genesee County

Donald A. Kuebler

Donald A. Kuebler P16282
Chief, Research, Training & Appeals